IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 411 of 2006.

Reserved on: 16.08.2007.

Decided on: 14.09.2007.

The Dehra Friends Co-operative Transport Society Limited. … … Petitioner.

Versus

The Presiding Officer & Another. … … Respondents.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the Petitioner:	**Mr. Rama Kant Sharma, Advocate**
For Respondent No.1:	**Mr. M.S. Chandel, Advocate General with Ms. Meenakshi Sharma, Deputy Advocate General.**
For Respondent No.2:	**Mr. Vijay Bhatia, Advocate vice Mr. Vinay Kuthiala, Advocate.**

Rajiv Sharma, Judge:

A challenge has been laid by the petitioner-Society to the award assed by the Labour Court-cum-Industrial Tribunal, Dharamshala in reference No.116 of 2004 on 1.10.2005.

The brief facts necessary for the adjudication of this petition are that the State Government had made the following reference to the Labour Court-cum-Industrial Tribunal, Dharamshala:-

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[1] *Whether reporters of local papers may be allowed to see the judgment? Yes.*

"Whether the termination of services of Shri Manohar Lal S/O Shri Lala Ram, Ex. Conductor by the President, The Dehra Friends Co-operative Transport Society Limited, Dehra, District Kangra, H.P. w.e.f. 16.9.2003 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation Shri Manohar Lal is entitled to?"

In sequel to the reference made by the State Government, the respondent No.2 (hereinafter referred to as the workman for the convenience sake) had filed his statement of claim. He had primarily contended before the Labour Court that his retrenchment effected with effect from 16.9.2003 was illegal. The employer had filed detailed reply to the statement of claim. The Labour Court on the basis of the evidence led by the parties had answered the reference in affirmative by holding that the workman was entitled for reinstatement with full back wages with effect from 27.2.2003 with interest at the rate of 9% per annum with all consequential benefits including seniority in service vide award dated 1.10.2005.

Mr. Rama Kant Sharma had strenuously argued that the award dated 1.10.2005 is not sustainable in the eyes of law since the Labour Court has not appreciated the evidence in accordance with law. Mr. Rama Kant Sharma had further contended that the Labour Court had exceeded its jurisdiction by granting back wages with effect from 27.2.2003 with interest at the rate of 9% per annum. Shri Vijay Bhatia, Advocate appearing vice Shri Vinay Kuthiala on behalf of the workman has supported the award dated 1.10.2005.

I have heard the learned counsel for the parties and have also gone through the record carefully.

The workman was engaged as Conductor with the employer in the month of March, 1986. He had applied for six days' leave with effect from 21.10.2002 to 26.10.2002. He could not join his duties on 27.10.2002 as the Doctor had advised him rest for 125 days. He was not permitted to join his duties on 27.10.2003. He had submitted his fitness certificate alongwith his joining. He was terminated from service with effect from 16th September, 2003.

Mr. Rama Kant Sharma though had taken objection with regard to the maintainability of the reference before the Labour Court, but in view of the law laid down by this Court in the ***The Palamur Co-operative Marketing and Consumer Federation Limited versus State of H.P. and others, Latest HLJ, 2007 (2) 713*** he had given up this ground.

The workman had appeared as PW-1 and had also filed his affidavit Ext.P-1 in evidence. He had contended that his termination with effect from 16.09.2003 was against the principles of natural justice and he had completed 240 days in each calendar month of his 18 years regular service. He had denied that he has abandoned his job. The version of the workman has been duly supported by the affidavits filed on record by Shri Ravinder Walia and Bhuri Singh, who were working as drivers with the employer. They have stated in their affidavits that the workman had submitted medical certificate at the time of joining, i.e. on 27.2.2003, but the same was not taken into consideration.

Mr. Bimal Kishore Sharma, Ex-President has appeared on behalf of the Management as RW-1 and has also filed his affidavit Ext.RW-1/A. He has testified that the Society had framed its own bye-laws and Service Rules vide Ext.RW-1/B. He had stated that the workman was issued a letter to join his duties. He had also

admitted that the services of the workman were terminated illegally by the Society on 16th September, 2003 since one month's notice was not issued nor any retrenchment compensation in lieu of the notice was given to the workman. He had further admitted that the employer had not conducted any inquiry as stipulated under the service rules. It is evident from the language employed in clause 14 of the service rules that one month's notice was required to be issued to the workman before terminating his services. This has admittedly not been done by the employer-Society. The plea of Mr. Rama Kant Sharma that it was a case of abandonment has not been proved in accordance with law. In fact, the workman had approached the employer on 27.2.2003 with medical certificate, but despite that he has not been permitted to resume his duties. PWs.2 and 3 had duly supported the version of the workman that he was not permitted to resume his duties on 27.2.2003.

The Labour Court after considering the evidence brought on record, oral as well as documentary had come to the just conclusion that the retrenchment of the workman was in violation of clause 14 of the service rules as well as Section 25-F of the Industrial Disputes Act, 1947.

Now this Court has to consider whether the Labour Court had rightly awarded the back wages to the workman with effect from 27.2.2003 or not.

The workman in Ext.PW-1/A has specifically stated that he was un-employed after his retrenchment. RW-1 has stated in his evidence that the workman was gainfully employed after his retrenchment at another place, but in his cross-examination he has categorically stated that he had no knowledge as to where the workman was engaged after his retrenchment.

The Labour Court after considering the evidence led by the parties had arrived at a correct finding that the workman was not gainfully employed after his retrenchment, i.e. after 16.9.2003. Since the workman has not been permitted to join his duties with effect from 27.2.2003 onwards, the Labour Court has correctly granted the full back wages with effect from 27.2.2003 with interest at the rate of 9% per annum.

The Hon'ble Supreme Court has laid down the law under what circumstances the workman is to be granted full or partial back wages after his reinstatement has been ordered by the Labour Court. Their Lordships of the Hon'ble Supreme Court have held in ***M/s. Hindustan Tin Works Pvt.Ltd. Versus The Employees of M/s Hindustan Tin Works Pvt. Ltd. and Others, (1979) 2 SCC 80*** that where the termination of service is held bad, the payment of full wags is proper. Their Lordships have held as under: -

> **"It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of**

by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subject to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz., to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the apex Court now they are being

told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat High Court in *Dhari Gram Panchayat v. Safai Kamdar Mandal,* and a Division Bench of the Allahabad High Court in *Postal Seals Industrial Co-operative Society Ltd. v. Labour Court II, Lucknow,* have taken this view and we are of the opinion that the view taken therein is correct."

Their Lordships of the Hon'ble Supreme Court have held in ***P.G.I. of Medical Education & Research, Chandigarh Verus Raj Kumar, (2001) 2 SCC 54*** that the decision to award full or partial back wages depends on the facts and circumstances of each case and there can be no straight-jacket formula for that purpose. Their Lordships have held as under:-

"The issue as raised in the matter of back wages has been dealt with by the Labour Court in the manner as above having regard to the facts and circumstances of the matter in the issued, upon exercise of its discretion and obviously in a manner which cannot but be judicious in nature. In the event, however, the High Court's interference is sought for, there exists an obligation on the part of the High Court to record in the judgment, the

reasoning before however denouncing a judgment of an inferior Tribunal, in the absence of which, the judgment in our view cannot stand the scrutiny of otherwise being reasonable. There ought to be available in the judgment itself a finding about the perversity or the erroneous approach of the Labour Court and it is only upon recording therewith the High Court has the authority to interfere. Unfortunately, the High Court did not feel it expedient to record any reason for less any appreciable reason before denouncing the judgment.

Their Lordships of the Hon'ble Supreme Court in ***Kendriya Vidyalaya Sangathan and Another Versus S.C. Sharma, (2005) 2 SCC 363*** that for determining the entitlement of a person to back wages, the employee has to show that he was not gainfully employed and the initial burden is on him and if he places materials in that regard, the employer can bring on record the materials to rebut the same. Their Lordships have held as under:-

"Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was a natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

In the present case the workman had placed the material on record by way of his affidavit Ext.PW-1/A to the effect that he was not gainfully employed after his retrenchment. The same has not

been rebutted by the employer by placing any material on record except a bald statement in Ext.RW-1/A that the workman was gainfully employed, but in his cross-examination Shri Bimal Kishore Sharma had testified that he had no knowledge whether the workman was engaged gainfully or not. It will be appropriate to produce the relevant portion of cross-examination of RW-1 whereby he had stated that he had no knowledge that the workman was employed in an other transport Society or any other office:-

> **"I cannot say that after termination of the petitioner he was employed in any other transport Socty. or any other office."**

The judgment cited by Mr. Rama Kant Sharma rendered in CWP No. 781 of 2005 decided on 16.05.2007 titled ***The Dehra Friends Co-operative Society Limited, Dehra versus Presiding Officer, Labour Court-cum-Industrial Tribunal, Dharamshala*** is distinguishable since the workman it appears has not placed any material on record to substantiate his plea that he was not gainfully employed. In the present case the workman had discharged initial burden of not being gainfully employed, but the employer has failed to place any material on record to rebut the evidence of the workman.

Accordingly, it is held that there is neither any jurisdictional error nor any procedural irregularity in the award dated 1.10.2005. The Labour Court has correctly appreciated the evidence and had arrived at correct finding which need not be interferred by this Court in the writ jurisdiction.

Consequently, the writ petition is dismissed with no order as to costs.

(Rajiv Sharma) Judge.

September 14, 2007 *(sck).*